

# Chapter 3

## Disciplinary investigations

3.1 Responsibility for investigating suspected contraventions of the DFDA rests with the three Service police forces, under the overall command of the Provosts-Marshal. As the first step in any disciplinary process, investigations are vital to the integrity of the entire system. Inadequately conducted investigations have the potential to profoundly corrupt the operation of subsequent disciplinary mechanisms, thereby inflicting undue hardship on Service men and women.

3.2 It is imperative that disciplinary investigations are rigorous, impartial, and properly executed, with due consideration given to balancing the operational requirements of the ADF against the rights and interests of Service members.

3.3 This chapter has three sections. Section one sets out the framework within which disciplinary investigations are conducted. Section two highlights problems with disciplinary investigations. It briefly outlines shortcomings identified in previous inquiries and reviews the evidence before this inquiry. The third section of this chapter examines the various solutions offered, and outlines the committee's findings and recommendations.

### Reporting and investigation of alleged offences

3.4 DI(G) ADMIN 45-2 outlines the primary requirements and common procedures for the reporting, recording and investigation of alleged offences within the Australian Defence Organisation. It describes the roles of commanding officers, managers, and Defence Investigative Authorities (DIA).

3.5 Paragraph 8 of DI(G) ADMIN 45-2 identifies various types of 'notifiable incidents' that must be reported by ADO personnel to a DIA (through the chain of command if necessary). In addition to the specific types of incidents, there are several other factors that personnel should consider when determining whether an incident is notifiable, including whether the incident is 'sensitive, serious, or urgent'. This is determined by considering:

- the likelihood that the incident will bring the ADO into disrepute;
- the likelihood that an incident will attract media or parliamentary attention; and
- the likelihood that an incident may adversely affect the efficiency of the ADO.<sup>1</sup>

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1 DI(G) ADMIN 45-2, para. 10.

3.6 Where an incident has occurred, the CO or manager should determine whether it is 'notifiable' as soon as possible. All 'notifiable' matters must be reported to a DIA. Some incidents must and/or should be referred to civilian authorities for investigation. DI(G) PERS 45-2 provides guidance for referring matters to civilian police authorities. It states:

Members of the ADF are subject to the Defence Force Discipline Act and also to the ordinary criminal law of the Commonwealth, States and Territories. The disciplinary provisions of the DFDA serve the purpose of maintaining and enforcing Service discipline. This is different to the purpose served by the criminal law, and justifies a separate existence. However, the DFDA incorporates a number of offences which have recognisable counterparts in the criminal law (for example, assault and theft). This situation gives rise to the question of whether offences under the DFDA which also reveal ordinary criminal offences should be dealt with under the DFDA or by the civil authorities.<sup>2</sup>

3.7 Some offences *must* be referred to civilian police authorities.<sup>3</sup> In the case of other offences, jurisdiction under the DFDA may only be exercised in Australia during peacetime where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining Service discipline. In cases where jurisdiction is unclear, the advice of the relevant base, region or command legal officer must be sought.

3.8 DIAs are the Service police organisations that report to the Provosts-Marshal of the Navy, Army and Air Force, the investigative arm within Inspector-General Division, the Fraud Investigation and Recovery Directorate, and the Defence Security Authority.<sup>4</sup> DIAs are primarily responsible for:

- making decisions about whether or not to investigate notifiable incidents;
- preventing, detecting and investigating DFDA offences;
- referring relevant civilian offences to civilian criminal authorities for investigation where required;
- liaising with civilian police authorities and Defence Legal Officers (DLO) about matters referred to civilian authorities;
- determining whether to investigate civilian criminal offences where civilian agencies decline to act;
- conducting investigations; and

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2 DI(G) PERS 45-1.

3 Such as treason, manslaughter, and certain sexual offences. For more detail see DI(G) PERS 45-2, para. 4.

4 *ibid.*, para. 21.

- providing briefs of evidence to support prosecutions.<sup>5</sup>

3.9 This chapter examines the disciplinary investigation operations of the DIAs, with particular attention on the Service police.

## **Shortcomings in the investigation of service offences**

### **Previous inquiries**

3.10 Previous inquiries conducted by various entities have emphasised the importance of an effectively functioning disciplinary investigations process. Four inquiries in particular have made pertinent observations and recommendations about disciplinary investigations conducted by DIAs:

- the 1998 Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*;
- the 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade report, *Military Justice Procedures in the Australian Defence Force*;
- the 2001 Joint Standing Committee on Foreign Affairs Defence and Trade report, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*; and
- the 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force*, conducted by Mr J.C.S. Burchett QC.

### ***The 1998 Commonwealth Ombudsman's 'Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences'***

3.11 On 14 July 1995, General Baker (then CDF) asked the Ombudsman to conduct an 'own motion' investigation into matters surrounding allegations arising from an incident at a Defence base.<sup>6</sup> The Ombudsman's report, released in January 1998, examined the way the ADF responded to serious incidents. It detailed the mechanisms for both disciplinary and administrative investigations, highlighting many systemic flaws, and made a number of recommendations concerning how the military justice system could be more effectively structured.

3.12 The Ombudsman's observations revealed many shortcomings in both disciplinary and administrative investigations. In relation to disciplinary investigations, the Ombudsman noted:

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5 *ibid.*, para. 26.

6 Commonwealth Ombudsman, *Own Motion Investigation into how the Australian Defence Force Responds to Allegations of Serious Incidents and Offences*, January 1998.

- lack of experience and inappropriate training of those undertaking the investigation;<sup>7</sup>
- inadequate questioning techniques, recording of interviews and statement taking;<sup>8</sup>
- lack of guidance about evidence gathering and analysis;<sup>9</sup> and
- absence of a structured process for supervising or monitoring the progress of investigations.<sup>10</sup>

3.13 The Ombudsman best sums up the nature of the evidence before her at paragraph 5.53 of her Report:

I consider that there is evidence of a range of problems experienced in the conduct of investigations in cases examined by my office. These have included:

- Inadequate planning of investigations
- Failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed
- Pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response
- Failure to record evidence properly and, possibly, preparation of witnesses and unauthorised questioning of witnesses
- Failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made, and
- Inadequate record keeping.<sup>11</sup>

***The 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade Report 'Military Justice Procedures in the Australian Defence Force'***

3.14 The JSCFADT instigated the *Military Justice* report in 1999 following significant media and public interest in a spate of internal ADF inquiries, and several High Court challenges to the validity of aspects of the DFDA. Many of these inquiries

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7 *ibid.*, see paras 5.3–5.10 for military police and paras 5.11–5.17 for administrative investigating officers.

8 *ibid.*, paras 5.27–5.32.

9 *ibid.*, paras 5.41–5.47.

10 *ibid.*, paras 6.13 and 6.33. The Ombudsman noted at para. 6.34, that there was 'some monitoring of investigations undertaken by Army and the investigation of complaints of unacceptable sexual behaviour'.

11 *ibid.*, paras 5.54–5.56.

concerned the deaths of Service personnel, or injustices to members of the ADF in their dealings with the military disciplinary system. Criticism was levelled at the execution of internal inquiries and the overall operation of the administrative and disciplinary systems. Questions were also raised concerning natural justice and human rights protections.<sup>12</sup>

3.15 The JSCFADT's examination of the discipline system highlighted several issues including:

- failure to accord procedural fairness to Service personnel, especially in relation to the conduct of secret investigations under the auspices of the DFDA;<sup>13</sup> and
- inadequate education and training in DFDA operation, for both legally and non-legally qualified or educated users.<sup>14</sup>

***The 2001 Joint Standing Committee on Foreign Affairs Defence and Trade report 'Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion'***

3.16 The 2001 report *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* followed the 1999 JSCFADT *Military Justice* report, and examined allegations of brutality in 3<sup>rd</sup> Battalion, Royal Australian Regiment (3RAR) committed between 1996 and 1999.

3.17 Although relevant to its terms of reference, the JSCFADT was not made aware of the 3RAR allegations or the ADF investigations during the process of the 1999 *Military Justice* inquiry. The JSCFADT was concerned that information may have been withheld that could have materially affected the recommendations made in the 1999 report.<sup>15</sup>

3.18 The JSCFADT's findings in the *Rough Justice* report about the inadequacies of the Army's military police and the military justice system are of particular interest to this committee's current inquiry. With reference to the Army's military police force, the JSCFADT stated:

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12 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the ADF*, June 1999, p. ix.

13 *ibid.*, pp. 101–103.

14 *ibid.*, pp. 150–152.

15 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*, April 2001, p. 2.

It became readily apparent throughout the committee inquiry that there were serious issues regarding the competency of Army Military Police to carry out their policing and investigatory functions.<sup>16</sup>

3.19 The JSCFADT identified concerns about secrecy in the investigation process,<sup>17</sup> poor management practices,<sup>18</sup> inadequate resourcing,<sup>19</sup> and excessively long investigation and offence clearance times.<sup>20</sup> The JSCFADT made several recommendations to improve investigatory procedures, including:

- the establishment of a pool of military investigators for the conduct of military investigations;<sup>21</sup>
- increased exposure of investigators to civilian investigatory bodies as part of their training;<sup>22</sup> and
- an increased role for reserve military police.<sup>23</sup>

***The 2001 'Report of an Inquiry into Military Justice in the Australian Defence Force' conducted by Mr J.C.S. Burchett QC***

3.20 In December 2000, Admiral Barrie, then CDF, appointed Mr J.C.S. Burchett QC to examine the military justice system. Burchett undertook his examination at roughly the same time as the JSCFADT *Rough Justice* Inquiry. The *Report of an Inquiry into Military Justice in the Australian Defence Force* (the '*Burchett Report*') was completed in July 2001.

3.21 Burchett was empowered to examine broadly the administration of military justice and investigate aspects of the 3RAR allegations. The *Burchett Report* identified several issues relevant to the terms of the current inquiry. The report discussed a number of problematic aspects within the discipline system, and stated 'many of the problems the subject of submissions to the Inquiry had a strong link to a

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16 *ibid.*, p. 40.

17 *ibid.*, p. 27.

18 *ibid.*, p. 41.

19 *ibid.*, p. 42.

20 *ibid.*, pp. 42–44.

21 *ibid.*, p. 61.

22 *ibid.*, p. 61.

23 *ibid.*, pp. 44–5.

flawed investigation.<sup>24</sup> The report identified a number of what it termed 'investigative shortcomings',<sup>25</sup> including:

- delayed investigations;<sup>26</sup>
- unreasonable exertion of CO influence during investigative processes;<sup>27</sup> and
- procedural fairness and competence issues in investigation conduct.<sup>28</sup>

3.22 An analysis of the various inquiries conducted into the disciplinary system over the past decade reveals many recurrent flaws. Every major review has, to varying degrees, highlighted issues such as:

- delay in the conduct of disciplinary investigations;
- inadequate evidence gathering and analysis;
- lack of process monitoring or quality control;
- lack of transparency and contravention of principles of natural justice; and
- inadequate Military police training and guidance in basic military justice procedures, investigation conduct, and application of relevant policies and instructions.

3.23 The committee recognises that the ADF has endeavoured to improve the effectiveness of the disciplinary system in response to the various reports released over the past decade. Despite these efforts, however, repeated inquiries and reports indicate that the same problems continue to arise. Despite almost constant scrutiny, ADF personnel continue to suffer under a system that is seemingly incapable of effectively addressing its own weaknesses.

### **Difficulties highlighted in this inquiry**

3.24 Evidence before the present inquiry reveals that many of the problems outlined in previous reports have continued. The committee has received a number of submissions and heard testimony that either provided anecdotal evidence of flaws in military police investigations, or gave broader policy and procedural insight into

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24 *ibid.*, p. 19.

25 J.C.S. Burchett, *Report of an Inquiry into Military Justice in the Australian Defence Force*, July 2001. p. 116.

26 *ibid.*, p. 19.

27 *ibid.*, p. 19.

28 *ibid.*, p. 19.

military police operations. The evidence gathered echoed many of the themes from past reports.

### *Anecdotal evidence*

3.25 Anecdotal evidence described delayed investigations; the failure of investigators to pursue exculpatory evidence; investigator's failure to disclose relevant material to the accused; investigator's and commander's failure to advise the accused of allegations at the appropriate time; and investigator's and prosecutor's failure to obtain and/or act on specialist advice. This often led to prosecutor's failure to adequately weigh and assess witness evidence, ultimately leading to deeply flawed prosecutions.

3.26 One circumstance in particular illustrates all that can possibly go wrong in a disciplinary investigation, and the negative consequences that can ensue. This circumstance is described below.

#### *The East Timor SAS Investigation*

3.27 The committee was asked in its Terms of Reference to consider the process and handling of the ADF's investigation into allegations of misconduct by members of the Special Air Service (SAS) in East Timor.<sup>29</sup> In considering this term of reference, the committee paid particular attention to the case of the SAS soldier charged with mistreating the corpses of two militiamen. The treatment of the SAS soldier reveals most acutely the inadequacies of the current investigation structure, and the consequences that can flow from investigative failures.<sup>30</sup>

3.28 From the outset, the ADF gave repeated public assurances that the Timor investigations would be conducted to the highest standard. In the media briefing at which the ADF announced its intention to pursue charges against the SAS soldier, Lieutenant General Leahy briefed journalists on the conduct and outcome of the investigations, stating:

The end result is a rigorous and thorough investigation, and I would like to personally commend all those involved in the investigation for their commitment, their professionalism and their plan [sic] hard work.<sup>31</sup>

3.29 With specific reference to the incident giving rise to the charges against the SAS Soldier, Colonel Fogerty, Director of Personnel Operations, Army, stated 'The

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30 Discussion in this chapter will be limited to the disciplinary investigation. Other aspects of the SAS Soldier's case will be discussed in other chapters of this report.

31 Lieutenant General Peter Leahy, Chief of Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.



investigation into that matter has been particularly thorough<sup>32</sup> and Lieutenant General Leahy gave assurances that 'a very thorough investigation has been conducted.'<sup>33</sup>

3.30 The committee has received evidence revealing that the matter was grossly mishandled. Indeed, General Cosgrove and Lieutenant General Leahy felt obliged to issue the SAS soldier with a full and unreserved apology, following the findings of an independent inquiry into his treatment.<sup>34</sup>

3.31 Perhaps the duration of the investigation is the most patently obvious shortcoming in the inquiry into the SAS soldier's conduct. The circumstances giving rise to the original allegations of mistreatment occurred in October of 1999. In November of 1999 (then) Major General Cosgrove commissioned a murder investigation into the deaths of the militia men. This investigation was apparently conducted expeditiously and concluded there was no impropriety surrounding the deaths of the two militia men or the conduct of any ADF member.

3.32 Some months later, another investigation began into the deaths of the militia men. This investigation took over three years to complete. Evidence to the committee suggests that this investigation was unnecessarily protracted, and caused unnecessary hardship for the SAS soldier. In his submission to this inquiry, General Cosgrove acknowledged 'the investigation into these two allegations clearly took too long'.<sup>35</sup> The *IGADF-Commissioned Report* into the matter was also highly critical of the delay in the investigation:

I am of the opinion that the investigation was unnecessarily protracted, with the result that its overall cost could not be justified and it served to exacerbate the pressure upon XXXX in circumstances which ought to have been avoided.<sup>36</sup>

3.33 Moreover, during the three-year investigation, the SAS soldier was not directly questioned about the allegations made against him. In his evidence to the committee, the SAS soldier stated that he only became aware of the allegations

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32 Colonel Fogerty, Director of Personnel Operations, Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

33 Lieutenant General Peter Leahy, Chief of Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

34 On 23 September 2003, General Cosgrove instructed the IGADF to commission an independent report into the conduct of the SAS soldiers matter. The report shall be herein referred to as the *IGADF-Commissioned Report*. In its entirety the report comprised three documents. *Part A* was dated 31 October 2003, *Part B* dated 28 November 2003, and *Part C* was dated 20 January 2004.

35 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 78.

36 *IGADF Commissioned Report: Part A*, (Confidential Document) p. 37. This document was provided to the committee in confidence and has not been made public.

through colleagues and a series of newspaper reports. A committee member asked the soldier whether the illegal killing allegations were ever put to him. He replied that they were not. He only found out about them when he was charged and given a copy of the Brief of Evidence against him.<sup>37</sup>

3.34 In his submission to this inquiry, General Cosgrove informed the committee that, until recently, it was standard Army Military police practice for persons not to be informed that they were under investigation until the last possible moment. He acknowledged that affected members sometimes became aware of the investigation informally through third parties.<sup>38</sup> This concession reflected the experiences of several submitters to this inquiry.<sup>39</sup>

3.35 Despite the duration of the investigation (3 years and two months from incident to interview), the media attention, and the investigator's indiscrete conduct when interviewing potential witnesses, the SAS soldier told the committee that, he was never informed that he was under investigation.<sup>40</sup>

3.36 When various media organisations began to approach the soldier, his family and his legal representatives, he was only provided with advice and assistance about handling the media attention after repeated requests, and even then the advice was neither timely nor effective. He told the committee that initially his requests for assistance were not acknowledged or responded to. No steps were taken to protect his identity or his family's safety until he repeatedly requested a security assessment which was eventually conducted. He was expected to continue to work as normal, despite the enormous stress he was placed under.<sup>41</sup>

3.37 The committee finds it wholly unacceptable that the soldier was not questioned during the investigation, was not told that he was under investigation (despite its obvious conduct and the concomitant media attention), nor provided with adequate support or assistance in the face of the media glare. This delay, failure to inform, and failure to assist is wholly unsatisfactory. It placed the soldier and his family under extreme pressure, and calls into question claims that the system provides impartial, rigorous and fair outcomes.

3.38 It should be emphasised that the investigation process leading to the corpse-mistreatment charges was part of a major investigation into 19 different allegations of 'wrong doing' in East Timor, ranging from workplace harassment to illegal killing.

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37 In Camera *Committee Hansard*, 1 March 2003, p. 4.

38 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 74.

39 Mr Geoff Lewis, *Submission P55*, and Confidential *Submissions C4*, and *C37*.

40 Confidential *Submission C4*, p. 17.

41 Confidential *Submission C4*, p. 17.

The part of the investigation specifically pertaining to the SAS soldier originally stemmed from the illegal killing allegations (judged unfounded by an investigation launched by CDF in November 1999). On Lieutenant General Leahy's own admission the impetus for the new investigation arose from rumour and innuendo, rather than any concrete allegation of wrongdoing.<sup>42</sup>

3.39 The investigation into the illegal killing allegations—initiated on the basis of gossip—involved travel to four different countries, interviews with 350 witnesses, and the exhumation of two bodies.<sup>43</sup> The evidence before the committee suggests, however, that despite its duration and the amount of travel, time and effort involved, the quality of the investigation was extremely poor. The SAS soldier gave the committee his perspective:

The investigation by the service police was inadequate. The material provided by the service police, which formed the basis of the inculpatory witness statements was superficial... lacked particularity, corroboration and concurrence and was not appraised against the statements of the other 55 soldiers present... One of the senior investigators mentioned to the head of the investigative team that some members of the team were too inexperienced, but this was not acted upon. The length of the Service Police investigation was inordinately long and very expensive.

In my case I have been utterly let down by an investigation that has displayed such levels of incompetence that it has embroiled not only the Chief of Army and the Chief of the Defence force, but also the Minister for Defence and has been brought to the attention of the Prime Minister of Australia on several occasions.<sup>44</sup>

3.40 The committee is aware that the soldier's assertions in this regard are wholly substantiated by the *IGADF—Commissioned Report*. The Report detailed a litany of deficiencies in the investigations process, including poor interviewing, flawed evidence gathering and analysis, and failure to adequately weigh or pursue exculpatory evidence. It found that witnesses were essentially 'verballed'—the statements were conclusive rather than descriptive, contained superficial content, irrelevant, prejudicial and emotive material, and hearsay.<sup>45</sup> The Report concluded:

My finding is that the investigators lacked the necessary experience to conduct interviews of this type and that, although they interviewed every person who was reasonably available to them, the product of these

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42 In Camera *Committee Hansard*, 5 August 2004, pp. 11–14.

43 Lieutenant General Peter Leahy, Chief of Army, 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

44 Confidential *Submission C4*, p. 22.

45 *IGADF—Commissioned Report: Part A*, p. 31. (Confidential document).

interviews was not reflected by the effort and the attendant expense involved.<sup>46</sup>

3.41 General Cosgrove's initial submission to this inquiry acknowledged the poor quality of the MP investigation as detailed in the *IGADF-Commissioned Report*. He told the committee:

The inquiry also criticised the Service police investigation, particularly its duration, the superficial content of the statements of principal witnesses, and the inclusion of inadmissible, emotive material in such statements.<sup>47</sup>

3.42 The committee shares the concerns of the SAS soldier, when he states:

My case was investigated at the highest level using a triservice investigative task force, yet, through inexperience, delay and indecision, it ended up the fiasco that it is today.<sup>48</sup>

3.43 Unfortunately, the 'fiasco' was extraordinarily expensive. Lieutenant General Leahy indicated in a media release dated 16 April 2003 that the 'direct cost' of the investigation was in the order of \$130,000.<sup>49</sup> On 5 November 2003, the committee asked for a breakdown of the 'total cost' of the investigation into the SAS soldier's matter.<sup>50</sup> The question was taken on notice, and the 'direct cost' figure of approximately \$130,269 was given, comprising:

Forensic Support	\$ 7,000
Printing Costs	\$ 513
Drawing Costs	\$ 300
Travel and Accommodation	\$ 122,456
Total <sup>51</sup>	\$ 130,269

3.44 The committee was concerned that the answer provided by the Department of Defence did not provide the 'total cost' as requested by the committee. On 6 August 2004, the committee again requested that the total cost of the investigation be provided, including travel and accommodation costs, the man hours spent on the investigation, barristers fees and any travel or disbursements incurred by external legal advice, exhumation costs, and any costs relating to expert opinions sought.<sup>52</sup>

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46 *IGADF—Commissioned Report: Part A*, p. 33. (Confidential document).

47 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 79.

48 *In-Camera Committee Hansard*, 1 March 2004, p. 2.

49 Lieutenant General Peter Leahy, Chief of Army 'Defence Media Release: Transcript Media Briefing', 16 April 2003.

50 Question taken on notice, *Estimates Hansard*, 5 November 2003, p. 71.

51 Department of Defence, Answer to Question on Notice, 5 November 2003.

52 *In Camera Committee Hansard*, 5 August 2004, pp. 6–7.

3.45 Following this explicit request for the total costs of the investigation, the Department of Defence informed the committee that the *IGADF-Commissioned Report* conservatively estimated the investigation to cost in excess of \$500,000. This figure includes the \$130,000 'direct costs' figure, plus the approximate cost of the salaries for the 18 personnel directly involved in this aspect of the Timor investigations. It does not include the salaries of the senior staff officers in Army Headquarters supervising or supporting the investigation on behalf of Chief of Army, the Federal police investigators who assisted in the matter or the reserve senior counsel who provided advice to the Army on this matter.<sup>53</sup> Half a million dollars would appear, on the facts, to be a very conservative figure.

3.46 The initial investigation into the 6 October incident, undertaken in November 1999, found no grounds for taking further action against any soldier. To the contrary, the accounts before the committee suggest that all soldiers under attack in Suai conducted themselves with integrity and bravery of the highest order. Over half a million dollars was spent, however, on another investigation. This investigation was based on gossip, 'secretly conducted' and incompetently executed.

3.47 Following the release of the Media Statement containing an unreserved apology to the SAS soldier, Lieutenant General Leahy acknowledged during an Estimates hearing that the treatment of the soldier raised serious questions about the quality of disciplinary investigations. Put simply:

The investigation and some aspects of the service police investigation were of concern.<sup>54</sup>

3.48 The committee concurs, and shares the ADF's concern about the circumstances surrounding the treatment of the SAS soldier and the military police's capacity to perform their investigatory function. Moreover, it has grave concerns that the incompetence and lack of professionalism demonstrated in this soldier's case is not limited to this single instance. The question must inevitably arise—how many other ADF members are adversely affected by inadequately conducted disciplinary investigations? How many ADF members do not have the courage to speak out and just suffer in silence? The SAS soldier's treatment raises fundamental questions about the military police's capability to conduct the complex, serious and major investigations it has the remit to conduct.

3.49 The committee questioned Lieutenant General Leahy about the various shortcomings evidenced in the SAS soldier's case. It was noted that the investigation was initiated at the highest level, was particularly well-resourced, under significant media scrutiny, yet its outcome was described in terms such as 'superficial content of statements', 'inclusion of inadmissible material' and 'premature conclusions', and led

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53 Department of Defence, Answer to Question on Notice, 5 August 2004.

54 Lieutenant General Peter Leahy, Chief of Army, *Estimates Hansard*, 18 February 2004, p. 77.

to an unreserved apology to the soldier for the mistreatment he was subjected to. A committee member asked what confidence the committee could have in the conduct of other minor matters, given that the ADF's best ended so poorly.

3.50 Lieutenant General Leahy responded by asserting that the system works. He stated that the personnel involved did their best, and the soldier was able to complain to the IGADF at the end of the process. That complaint led to the identification of shortfalls, which Army is now attempting to address through the initiation of a review of the military police:

We are set up to handle certain things; this came as something well beyond what we would normally expect to do. I think that our military police, given the degree of training and the number of them that actually exist, have done a solid job on the way through this. They admit and I admit that they have made some errors. The acceptance of the fact that we need a review, the fact that the review will be reporting in May this year, is acknowledgment that we are seeking very clearly, using the justice system, to improve. I am confident that towards the middle of this year I will see a very positive way forward to make sure that this does not happen again.<sup>55</sup>

3.51 The system in this case clearly did not work, and the committee considers the stated reason for systemic failure—that it was 'something well beyond what we would normally expect to do'—is unacceptable.

3.52 Despite Lieutenant General Leahy's assurances that 'the system works', the committee is simply not convinced that this is the case. Furthermore, the capacity to lodge a complaint should not excuse a flawed process. An unfair process is not cured of defect by mere virtue of a complaints procedure.

#### *Other anecdotal evidence*

3.53 Other submissions to the inquiry have provided further examples of shortcomings in the investigations process. Mr Nigel Southam, who served with the Royal Australian Corps of the Military Police for over 20 years, provided an account of inappropriate commanding officer involvement in the investigation process, and the initiation of disciplinary action seemingly in retaliation for Mr Southam's lodgement of a redress of grievance about the conduct of the commanding officer.<sup>56</sup>

3.54 Mr Geoff Lewis detailed a secret investigation, apparently initiated in December 2003, that caused considerable personal hardship. Mr Lewis has been a member of the Army reserve since 1967, and is also an Officer of Cadets in the Australian Army Cadets. Similar to the SAS soldier, Mr Lewis only became aware of

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55 Lieutenant General Peter Leahy, Chief of Army, *Committee Hansard*, 1 March 2004, pp. 38–39.

56 Mr Nigel Southam, *Submission P19* and *Committee Hansard*, 9 June 2004.

the investigation into his activities through rumours passed on from friends. He was not informed that he was the subject of an investigation, and when he directly contacted the Military police to ascertain the nature of the allegations against him, Mr Lewis was stonewalled. Mr Lewis was never questioned in relation to the allegations made against him, but had inappropriate aspersions cast over his character when the investigator repeatedly contacted his employer. In his view, had he been given the opportunity to make representations about his case to the investigator, the matter could have easily been cleared up.<sup>57</sup>

### ***Systemic evidence***

3.55 Anecdotal evidence to the committee has revealed poor quality disciplinary investigations and instances where individuals have endured significant hardship. Insight into the potential root causes for this type of systemic breakdown was provided in submissions from individuals with considerable experience in the various Service police forces. The committee was also interested to receive the Ernst & Young *Review of Military Police Battalion Investigation Capability* (the Ernst & Young Report) which gave additional insight into the operation of the Army's Special Investigations Branch (SIB).

### ***Individual submissions***

3.56 Lieutenant Commander Brian Sankey, a member of the Navy for 27 years with 18 years of experience in the Naval Police Coxswain, provided the committee with an insight into the operation of the Royal Australian Navy's police service. He acknowledged that, whilst military police work requires a set of specialised skills for the collection, preservation and presentation of evidence, the training, resourcing, and experience in investigation units is wholly inadequate to support these activities. He noted that Naval investigation units are 'suffering from a severe shortage of qualified and experienced investigators,'<sup>58</sup> and highlighted a number of problems within the Naval Police Coxswain including:

- low priority given to the development and maintenance of policing and investigative skills, compared with the priority accorded to other Service obligations;
- under-staffing in the face of increasing workloads;
- inability to maintain investigatory expertise and proficiency due to the nature of 2-3 year postings (requiring different skills sets);
- low morale; and

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57 Mr Geoff Lewis, *Submission P55*, pp. 2–4.

58 Lieutenant Commander Brian Sankey, *Submission P4*, p. 6.

- inadequate preliminary and ongoing training and career development.<sup>59</sup>

3.57 The committee took the opportunity to draw from Mr Southam's military policing experience, in addition to discussing his experiences outlined at para. 3.46, when he appeared before the committee on 9 June 2004. Mr Southam was a member of the Royal Australian Corps of Military Police (RACMP) for over 20 years. His evidence echoed many of the concerns raised by Lieutenant Commander Sankey.

3.58 Mr Southam agreed that generally military police suffer from insufficient training, lack of numbers and overall inadequate resources. He indicated that workloads are increasing, the military police have lost, and continue to lose staff, and there can be up to two year delays on investigations.<sup>60</sup> He also commented that it is increasingly difficult to balance military policing functions with the other requirements of service:

Quality investigations have occurred, but certainly there seems to be too much else that MPs [Military Police] have to do—That is, be soldiers and try and keep up with other issues that are not MP.<sup>61</sup>

3.59 Mr Southam told the committee there were growing difficulties with attracting quality personnel to a career with the military police, and that generally an MP career was not considered to be prestigious:

I have worked in non-corps positions as well for over five years in training establishments and I can say that, in all honesty, military police are not held in great regard by other soldiers—not particularly for what they have to do but I guess for the culture that exists.<sup>62</sup>

3.60 Both Lieutenant Commander Sankey and Mr Southam possess significant experience in the military police forces, and both have identified several systemic issues that would indicate that the Service police forces have significant failings—poorly resourced, trained, and motivated. The themes raised by both these witnesses to the inquiry were reiterated in the Ernst & Young Report.

*The Ernst & Young 'Review of Military Police Battalion Investigation Capability'*

3.61 During the February 2004 Estimates hearings, Lieutenant General Leahy and General Cosgrove indicated that, partly in response to the apparent shortcomings evidenced by the SAS matter, an internal study had been commissioned into the

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59 *ibid.*

60 Mr Nigel Southam, *Committee Hansard*, 9 June 2004, p. 72.

61 *ibid.*, p. 73.

62 *ibid.*, p. 73.



operation of the military police's investigatory function.<sup>63</sup> General Cosgrove indicated that this review could be instructive for all three Services:

I am keenly interested in the outcome of the internal Army sponsored review of military police. The reason for this is that they are the largest policing part of the ADF and there will quite possibly be—almost probably—be some very good insights for the other services about smaller police groups.<sup>64</sup>

3.62 General Cosgrove's submission to this inquiry noted that the study was being conducted by the consultancy firm Ernst & Young, and concerned the 'quality' aspects of the Army's Military Police investigative capability.<sup>65</sup> The *Review of Military Police Battalion Investigation Capability* was completed in July 2004 and provided to the committee in December 2004. In his covering letter enclosing and broadly endorsing the Ernst & Young Report, Lieutenant General Leahy advised the committee:

The purpose of this review was to analyse the current state of the military police capability and recommend initiatives to move towards a better practice investigative capability...[the report] provides a sound basis for future progress.<sup>66</sup>

3.63 The Report made a number of observations that reflect a number of the problems highlighted in the anecdotal and systemic evidence received during this inquiry. It gave the committee another interesting perspective on the difficulties encountered by Army's disciplinary investigations unit, the Special Investigations Branch (SIB).

3.64 The Ernst and Young report found that the SIB's investigation capability has significant shortcomings and is in need of reform when compared to external investigative standards.<sup>67</sup> The report noted that the SIB has not kept abreast of external reforms directed at professionalising investigations capability; improving organisation effectiveness; improving management efficiency and investigation processes; making greater use of technology; and accepting heightened levels of accountability and governance.<sup>68</sup> Furthermore, the SIB's leadership was found to have put 'little if no effort' into benchmarking against external reforms or embarking on a programme of achieving improved standards since 2000.<sup>69</sup>

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63 General Peter Cosgrove, Chief of Defence Force, and Lieutenant General Peter Leahy, Chief of Army, *Estimates Hansard*, 18 February 2004, p. 54.

64 General Peter Cosgrove, Chief of Defence, *Estimates Hansard*, 18 February 2004, p. 54.

65 General Peter Cosgrove, Chief of Defence, *Submission P16*, p. 73.

66 Lieutenant General Leahy, Chief of Army, Correspondence dated 29 November 2004.

67 Ernst & Young, *Review of Military Police Battalion Investigation Capability*, p. 5.

68 *ibid.*

69 *ibid.*

3.65 The report highlighted inordinate delay in the reporting and investigation of notifiable incidents as a persistent problem;<sup>70</sup> inadequate staffing levels;<sup>71</sup> excessive workload coupled with insufficient manpower and equipment;<sup>72</sup> and a lack of consistency in decision making.<sup>73</sup> The report questioned the competency of SIB investigators to manage major or sensitive investigations, particularly investigations into serious crimes committed overseas;<sup>74</sup> and also identified the presence of a culture within SIB that 'contravenes the investigation principles of impartiality and fairness'.<sup>75</sup>

3.66 Low morale and management's failure to value SIB personnel was also raised as an issue:

We found many investigators 'want out' and we understand very few 'want in'...We have noted in our comparison with better practices elsewhere, that the effectiveness of SIB is impaired by what we regard as an 'unhealthy' work environment. Old world management practices and attitude on organisational effectiveness within SIB needs a fundamental rethink...The exercise of an autocratic fear based control paradigm adversely impacts upon productivity and performance—as well as stifling innovation...Management's interest seems to be intent on getting the job done at the expense of the social and family life of investigators.<sup>76</sup>

3.67 These factors are all severely impacting upon the operational effectiveness of the SIB, and affecting recruitment and retention rates:

We believe Army is in a desperate situation with regard to attracting sufficient numbers of skilled personnel to its investigation capability.<sup>77</sup>

3.68 The report stated:

We found in our review of the SIB against the Statement of Work that:

- the investigative capability is unsustainable under current arrangements and conditions;
- aspects of the culture are inappropriate to the internal investigation function;
- organisational effectiveness is constricted;

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70 *ibid.*, pp. 21, 34.

71 *ibid.*, p. 17.

72 *ibid.*, p. 37.

73 *ibid.*

74 *ibid.*, p. 5.

75 *ibid.*, p. 27.

76 *ibid.*, pp. 20–21.

77 *ibid.*, p. 28.

- investigation processes are inefficient;
- management tools, including case management are inadequate;
- some degree of management inertia exists in relation to continuous improvement; and
- the wellbeing of investigators is a secondary consideration.<sup>78</sup>

3.69 The Ernst & Young Report highlighted that these difficulties were not attributable to individual shortcomings on the part of certain personnel within the SIB, rather that criticism:

Relating to the timeliness and quality of work has its root causes in process, structure and management rather than individuals' efforts and commitments.<sup>79</sup>

3.70 The independent investigation of significant complaints against SIB was also raised as 'an issue'.<sup>80</sup> The Report stated 'there is currently no oversight of the investigation of complaints against SIB, other than within Army's chain of command'.<sup>81</sup> The report noted, however, the capacity of the Inspector General Defence (IGD) and the IGADF to investigate certain types of complaints.<sup>82</sup>

3.71 A number of recommendations aimed at improving the capacity for the SIB to conduct its investigatory function were also made, and are discussed below. The overall tenor of the Ernst & Young report, however, describes an organisation in need of reform, and reiterates many of the committee's concerns with regard to the ADF's capacity to deliver impartial, rigorous and fair outcomes in the disciplinary context.

#### *The Director of Military Prosecutions*

3.72 In the course of his evidence to the committee on Monday 2 August, the Director of Military Prosecutions, Colonel Hevey, also expressed doubts concerning the capacity of Service police (particularly Army) to perform their function adequately. He informed the committee that, upon taking office as the DMP, he perceived a 'basic problem' in the training and policy development of military police.<sup>83</sup> He indicated that he had an informal level of involvement in the training of Naval

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78 *ibid.*, p. 6.

79 *ibid.*, p. 5.

80 *ibid.*, p. 49.

81 *ibid.*

82 *ibid.*

83 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, p. 51.

Investigative Service personnel, providing basic lectures on the structure of a record of interview.<sup>84</sup>

3.73 The DMP told the committee that upon taking office, he had assumed that investigators were adequately trained. He quickly found, however, that a lot of capability had been lost as a result of the disbandment of the special investigation branches. He suggested that investigators were perhaps not properly focussed on the things a prosecutor might require in order to conduct a matter adequately. A committee member suggested that an appropriately drawn record of interview is not a particularly unreasonable demand. Colonel Hevey agreed, but told the committee that twelve months ago, the military police could not provide adequate records of interview. He indicated that improvements in the last twelve months were largely due to the informal training provided by his office, but also noted that new training initiatives aimed at improving standards are to be developed, involving the Australian Federal police and other professional organisations.<sup>85</sup>

### ***The policy/procedural framework—manuals and procedures***

3.74 To obtain a more detailed and in-depth perspective on the policies and procedures governing the conduct of DFDA investigations, the committee requested the manuals, guidelines and Service instructions used by the Army, Navy and Air Force military police for the conduct of disciplinary investigations.<sup>86</sup> In the first instance, the committee was referred to the *Discipline Law Manual* (DLM). The DLM expressly provides 'Chapters 2 to 12 are a layman's guide to this law'.<sup>87</sup> True to this statement, the DLM contains a very scant and basic outline of the policies and processes governing DFDA investigations in Chapter Three. It does not contain any detailed guidance. Upon further request to the ADF, various documents were provided to the committee, including:

- Navy Investigative Service Quality Manual;
- 5<sup>th</sup> Military Police Company Special Investigation Branch Standing Orders;
- Military Police Technical Instruction Number 200 (Special Investigation Branch) Policy and Procedures; and
- Section 4 of the RAAF Police Manual (DI(AAF)AAP 4332.001).

3.75 These documents reveal a considerable degree of inconsistency between the three Services in the policies and procedures governing the conduct of disciplinary

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84 *ibid.*

85 *ibid.*, p. 52.

86 *Committee Hansard*, 10 August 2004, p. 8.

87 *Discipline Law Manual* ADFP 201 Volume 1, para. 1.18.

investigations. Significant discrepancy in the manuals with respect to the quantity and quality of detail and guidance provided in aspects of investigation techniques, evidence collection and brief composition is also noticeable.

3.76 Moreover, the committee notes that *Technical Instruction Number 200*, governing the conduct of the Army's Special Investigation Branch was written some 19 years ago, and was apparently last updated in 1990. The copy of the *Technical Instruction* provided to the committee has numerous incomplete and missing sections, incorrect and jumbled pagination, and missing pages. Notwithstanding this, it was formally provided to the committee as a document tendered to this inquiry.

3.77 The committee found several sections of the *Technical Instruction* highly offensive. These sections contain material and guidance reflecting outdated and prejudiced attitudes towards several sections of the community. This material should have no have a place in any modern organisation's operational manuals or guidelines. The committee has taken the view that the material need not be placed on the public record. The committee would like to emphasise, however, its concern at the grossly substandard state of Army's manual.

3.78 The ADF has indicated that this manual contains 'The extant instructions for the conduct of military police investigations' for the Army Special Investigations Branch.<sup>88</sup> The committee acknowledges that the *Technical Instruction* should be read in conjunction with the various other policy documents concerning Army's DFDA investigations, but is alarmed that these outdated 'extant instructions' still form part of the body of reference material from which Military police are expected to draw guidance for the conduct of investigations.

3.79 Despite the disarray evidenced in the Army's Investigation Manual, the committee notes that new Defence Investigation Technical Instructions (DITI) are currently under development. The new DITI are intended to consolidate the various single Service manuals and instructions for the conduct of Service criminal investigations and ensure that DFDA investigations are executed in accordance with Australian Government Investigation Standards and industry best practices. The ADF indicated that the DITI were intended for implementation in January 2005. This is a welcome and long-overdue development, but the committee is nonetheless concerned that, similar to other planned improvements to the investigations process, actual implementation of improvements encounters significant delay.

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88 Department of Defence, Answers to Questions on Notice, 10 August 2004.

3.80 The Department of Defence was asked about the status of the new DITI during the June 2005 Estimates hearings, but was unable to provide any further information. The question was taken on notice.<sup>89</sup>

3.81 The committee notes that the current *Naval Investigative Service Quality Manual* and the excerpts from the Air Force Defence Instructions relating to investigations are much more coherent, ordered, comprehensive and up-to-date than Army's instructions. Whilst positive for Navy and Air Force, this nonetheless reveals the kind of stark inconsistencies between the three Services' attitudes, standards and practices.

3.82 Anecdotal evidence from victims of the system, evidence from personnel with decades of experience in the military police, and the ADF's own report all indicate fundamental shortcomings in the disciplinary investigations process. The committee received evidence outlining inordinate delay, secret investigations, inadequately trained investigators, lack of equipment, outdated manuals, low morale, inability to attract and retain high quality personnel, and overall inadequate resourcing—all occurring at a time when workloads are increasing and community respect for Service personnel and expectations regarding standards of fairness and accountability are rising. The committee believes that it is time to address seriously the flaws within the disciplinary investigations system.

### **Solutions offered in evidence**

3.83 The committee received evidence outlining several current ADF initiatives intended to improve the conduct of disciplinary investigations, in addition to suggestions from other submitters. The committee has also considered overseas developments of relevance and interest to its terms of reference.

### ***Suggestions from submissions to this inquiry***

3.84 Lieutenant Commander Sankey offered a number of recommendations to improve the quality of disciplinary investigations.<sup>90</sup> He suggested that military police should participate in up-to-date military and civilian police training courses. This would enable investigators to maintain the capacity to investigate offences and manage investigations both in Australia and overseas. Another suggestion entailed the recruitment of reservists from the civilian police force. Lieutenant Commander Sankey suggested that this would solve the shortfall in experienced officers, increase the professionalism of MP investigators, and increase MP exposure to personnel who have considerable expertise and skills in civilian police practice and procedures.

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89 Foreign Affairs, Defence and Trade Legislation Committee *Estimates Hansard* 31 May 2005, pp. 69–70.

90 Lieutenant Commander Brian Sankey, *Submission P4*.

Lieutenant Commander Sankey also suggested that there needs to be an element of 'cultural shift' within the Navy itself:

In my opinion the effectiveness and efficiency of the NPC Category, and in particular the law enforcement aspects, are at an all time low...it is sadly a case of neglect with little interest in the professional development of the categories of officers...The military justice system can never be effective in Navy until management gives policing and law enforcement the prominence that it rightly deserves. The proficiency of the Naval Police Coxswain can only improve after senior Navy management realises the important requirement to have a consolidated, independent and professional investigative service.<sup>91</sup>

3.85 The SAS soldier also gave the committee some suggestions for improving the disciplinary investigations function. He suggested that a serious criminal investigations branch could be established, staffed with state police detectives acting as reservists on duty, and possessed of an efficient and professional permanent staff.<sup>92</sup>

3.86 The experiences and suggestions given in evidence from Lieutenant Commander Sankey and the SAS soldier reveal that the problems with disciplinary investigations are clearly not confined to any one Service—they are common to all three. As such, suggestions for reform should be made with a view to improving the ability of all three Service police forces to improve their capacity to conduct disciplinary investigations.

#### ***Recommendations from the IGADF-Commissioned report into the SAS Soldier's matter***

3.87 The instrument of appointment for the inquiry into the treatment of the SAS soldier empowered the investigator to make recommendations arising out of the findings in his report. In the report, the investigator noted:

My comment, and it is only a comment, is that Service Police are, by and large, not experienced in dealing with civil offences which are service offences by reason of DFDA, save for offences of dishonesty and basic assaults.<sup>93</sup>

3.88 To improve the capacity of Service police to perform their investigatory function, the *IGADF-Commissioned Report* suggested that a special criminal investigation branch should be established. Members of this branch should include

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91 Lieutenant Commander Brian Sankey, *Submission P4*.

92 In Camera *Committee Hansard*, 1 March 2004, p. 2.

93 *IGADF-Commissioned Report: Part A*, p. 63.

specialist State police detectives serving as reserve members and highly efficient and professional permanent investigators.<sup>94</sup>

### ***Suggestions from Michael Griffin's Issues Paper***

3.89 Mr Griffin also made a number of suggestions concerning disciplinary investigation reform.<sup>95</sup> He stated:

Few would argue with the idea that the ADF needs to maintain its own disciplinary system. However, that may not extend to operating an entire criminal system in duplication of the civilian environment. Practical considerations and harsh reality call into question the continued maintenance out of the public purse of a small and under-skilled criminal investigation service.<sup>96</sup>

3.90 Mr Griffin's suggested initiatives to improve disciplinary investigation outcomes include:

- outsourcing the investigative function (potentially to the Australian Federal police) 'to allow Service police to concentrate on their key military functions in support of the forces in the field';<sup>97</sup>
- in peacetime, referring all criminal activity to civilian counterparts, whilst maintaining close liaison;<sup>98</sup> and
- recruiting reservists from State police and the AFP.<sup>99</sup>

3.91 Mr Griffin suggested that outsourcing would free up resources for other ADF 'core business' activities, and relieve commanders of having to decide which crimes to deal with, allowing them simply to 'refer all suspected criminal activity to the civilian specialists located a few kilometres past the barracks gate'.<sup>100</sup>

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94 *ibid.*

95 Mr Griffin was engaged by the committee in a consultative capacity to provide expert legal analysis of the evidence before this inquiry. He provided a paper, titled *Senate Inquiry into the Effectiveness of the Military Justice System*, to the committee. The paper is herein referred to as *Issues Paper*.

96 Michael Griffin, *Issues Paper*, para. 28.

97 *ibid.*, p. 27.

98 *ibid.*

99 *ibid.*

100 *ibid.*, para. 28.



### ***Suggestions from the Ernst & Young Report***

3.92 Following the analysis of the various shortcomings within the SIB, the Ernst & Young Report made a number of recommendations to improve the SIB's investigative capability. As a general statement, the Report argued:

Army will need to give its investigation capability a new identity and image, appoint enlightened and expert investigation managers/leaders, move to professionalise its investigators, improve organisational effectiveness, recruit quality from across the ADF and attend to issues of well being if it is to maintain a sustainable capability.<sup>101</sup>

3.93 In terms of specific recommendations, the Report suggested:

- changes to command and organisational structure, essentially reconfiguring the SIB into an 'Army Investigation Service';
- a new case management system;
- the introduction of a personnel development programme;
- reduction of excessively bureaucratic administrative procedures;
- the establishment of Memorandums of Understanding (MOU) with state and federal civilian police for the provision of investigation, forensic, training and secondment services;
- MOUs with civilian services for the provision of quality assurance reviews;
- the establishment of key indicators against which performance can be monitored;
- the appointment of a legal officer to provide legal and quality assurance advice;
- the formal appointment of the IGADF to administer complaints against the proposed new 'Army Investigation Service';
- a review of Brief of Evidence procedures (preparation and circulation) and case and file management practices;
- equipment updates;
- various legislative amendments to facilitate the above changes, clarify powers of arrest, and allow specially qualified investigators to conduct investigations under the authority of Chief of Army;
- undertake a recruitment drive, and broaden the recruitment pool;

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101 Ernst & Young, *Review of Military Police Battalion Investigation Capability*, p. 7.

- review and modernise training practices to bring military investigations in line with civilian standards; and
- increase training to all investigation personnel and introduce a coaching programme for junior/inexperienced investigators.<sup>102</sup>

3.94 The various recommendations contained in the submissions to this inquiry, Mr Griffin's issues paper and the Ernst & Young report, in addition to the suggestions made by witnesses, have all aided the committee greatly in its inquiry, and all warrant the attention and sustained consideration of the ADF. To inform its deliberations, the committee also considered Canada's experience.

### ***The Canadian Military Police Complaints Commission***

3.95 The Committee notes the statement in the Ernst & Young Report that the independent investigation of significant complaints against SIB was 'an issue',<sup>103</sup> and the report's recommendation that the IGADF be formally appointed to administer complaints. It notes further that Canada has an independent mechanism for handling and investigating complaints against Service police.

3.96 In response to a number of complaints and serious incidents involving the military police, the Canadian Government created the Military Police Complaints Commission in 1999 (MPCC). The MPCC was established as a quasi-judicial, independent civilian agency to examine complaints arising from either the conduct of military police members in the exercise of policing duties or functions, or from interference in or obstruction of their police investigations. All members of the MPCC are civilians, and are independent of the Department of National Defence and the Canadian Forces.<sup>104</sup>

3.97 The Lamer Report, which reviewed the legislation governing the MPCC, noted that the MPCC is an 'important oversight body responsible for ensuring that complaints as to military police conduct and interference with military police investigations are dealt with fairly and impartially'.<sup>105</sup> The Lamer report noted, however, 'the predicated scale of the workload of the Military Police Complaints Commission... seems to have been significantly overestimated'.<sup>106</sup>

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102 *ibid.*, pp. 59–68.

103 *ibid.*, p. 49.

104 More information about the MPCC is available from <http://www.mpcc-cppm.gc.ca/>

105 The Rt Hon Justice Antonio Lamer *The First Independent Review of by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions of Bill C-25, An Act to Amend the National Defence Act and to make the Consequential Amendments to Other Acts as required under Section 96 of Statutes of Canada 1988, c.35*, September 2003, p. 2.

106 *ibid.*, p. 2.

***ADF initiated change***

3.98 The committee notes that the ADF has attempted to address a number of issues arising in the submissions and evidence provided to this inquiry.

***Secret Investigations***

3.99 General Cosgrove indicated that remedial action has been taken in an attempt to address the problems surrounding secret investigations:

Chief of Army has indicated that this practice cease. Since early 2003 all personnel who are the subject of an investigation are informed of that fact through their chain of command at the commencement of the investigation.<sup>107</sup>

3.100 The committee notes the submission from Mr Geoff Lewis,<sup>108</sup> however, which provides detail concerning a secret investigation begun in early December 2003. This evidence casts doubt on whether Chief of Army's directive concerning the conduct of disciplinary investigations has been fully implemented.

***Improving the Serious Crime Investigation capability***

3.101 In his evidence to the committee, Mr Geoff Earley, IGADF, indicated that he is currently working with the ADF to enhance the serious crime investigation capability, possibly with the assistance of the civil police. The programme is at the early development stage:

Further examination of how we might go about that is under development right now with the establishment of a working party and a project officer.<sup>109</sup>

3.102 The committee asked Mr Earley if a time line had been established for the implementation of this programme. Mr Earley indicated that there had not. 'In-principle' agreement had been reached concerning the need for a tri-Service investigative capability. However, the project team examining the practicalities of such an entity has only recently been established.<sup>110</sup>

3.103 The committee welcomes this initiative, but is concerned at the apparent lack of an implementation timeframe.

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107 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 74.

108 Mr Geoff Lewis, *Submission P55*.

109 Mr Geoff Earley, Inspector General Australian Defence Force, *Committee Hansard*, 5 August 2004, pp. 87–8.

110 Mr Geoff Earley, Inspector General Australian Defence Force, *Committee Hansard*, 5 August 2004, pp. 87–8.

*Response to the Ernst & Young Report*

3.104 The committee acknowledges that Lieutenant General Leahy initiated the Ernst & Young Report to improve the quality of disciplinary investigations following a series of incidents, reports and inquiries that cast serious doubts about the competence of the military police.

3.105 In his correspondence enclosing the Ernst & Young Report, Lieutenant General Leahy indicated to the committee that a number of recommendations contained within the report require further development before being considered for implementation, but nonetheless expects 'that most recommendations will be accepted and implemented'.<sup>111</sup> Lieutenant General Leahy also informed the committee that a number of initiatives resulting from the Ernst & Young Report, aimed at enhancing individual investigators and improving the organisational environment, have already commenced.<sup>112</sup> He stated:

I am confident that initiatives already in place have resulted in a better capability and, when combined with those that are currently being developed, will deliver a superior investigative capability in future years.<sup>113</sup>

*Findings and recommendations*

3.106 Having considered the evidence before it, the committee holds grave concerns about the ADF's capacity to conduct rigorous and fair disciplinary investigations. Somewhat reminiscent of the concerns voiced in the 2001 *Rough Justice* Report, this committee also considers that serious issues surround the competency of the military police to carry out their policing and investigatory function.

3.107 The committee notes that there are three types of offences that Service police may currently investigate:

- specific disciplinary offences;
- Service offences that have civilian criminal equivalents; and
- offences under the laws applicable in the Jervis Bay Territory.

3.108 The committee considers that the ADF has proven itself manifestly incapable of adequately performing its investigatory function. Whilst noting the recommendations advanced in the Ernst & Young report, and seeing great value in the ideas put forward, the committee does not think that the implementation of these recommendations go far enough. A decade of rolling inquiries has not met with the broad-based change required to provide adequate protection of the rights of Service

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111 Lieutenant General Peter Leahy, Chief of Army, *Correspondence* dated 29 November 2004.

112 Lieutenant General Peter Leahy, Chief of Army, *Correspondence* dated 29 November 2004.

113 Lieutenant General Peter Leahy, Chief of Army, *Correspondence* dated 29 November 2004.

men and women. Each inquiry has led to the recurrence of the same problems and further disappointment. Attempts to change have proven ineffective.

3.109 The discipline process reaches its culmination in the trial of charges before a Service Tribunal. The Service police investigative function is critical to the effectiveness of the military justice system. As in the civilian environment, an efficient and effective police force is the cornerstone of a sound justice system. In many ways the present status of the Service police is a metaphor for the entire military justice system. The Burchett report and Lieutenant General Leahy's reference to Ernst and Young show that the organization is dysfunctional.

3.110 This committee has received submissions from Service police members which describe an organization in crisis. Members complain of poor morale, of being over-worked and under-resourced, of loss of confidence, lack of direction and a sense of confusion about their role and purpose. The Committee believes it is time to consider another approach to military justice.

3.111 Not long ago, the ADF and Army in particular, was a totally self supporting entity, capable of being deployed to foreign shores where it could and did support and administer itself. It had its own Survey Corps, its own Education Corps, its own Pay Corps and its own Catering Corps and performed numerous other logistic functions from its own personnel resources. There were many reasons for this not least of which were the tyranny of distance and the complete absence of alternative sources of support.

3.112 However, the modern ADF and the battlefields and operational theatres are very different. Civilian management principles of 'core business' and 'outsourcing' have been widely applied across the military. Civilian contractors are everywhere, including Iraq, and have played a significant role in most of the recent ADF operational deployments. The committee believes the role of a criminal law system in the 'core business' is past, and it is appropriate to 'outsource' what is essentially a duplication of an existing civilian system.

3.113 Broad criminal investigative experience and deep knowledge of the law should be the hallmarks of any investigative service—civilian or military. Civilian police investigators, however, are generally better trained and more experienced in the conduct of criminal investigations than military personnel. Whilst knowledge of the military context is important, the attainment of rigorous and fair outcomes should be the primary aim of a competent system of military justice.

3.114 Outsourcing criminal investigations in peacetime would allow the Service police to concentrate on their key military functions in support of the forces in the field. The committee believes that in peace-time Australia they should refer all criminal activity to their civilian counterparts and focus their resources on training and developing their core business.

3.115 The AFP has had a conspicuous presence in many recent operational theatres. The high level forensic policing skills that the AFP possesses were evident to the

world in the aftermath of the Bali bombing and were also used to great effect in the investigation of atrocities in East Timor and the Solomon Islands. When overseas and on active service, these and other criminal law functions currently performed by Servicemen and women could readily be 'outsourced' to the AFP, whose entire business it is to conduct criminal investigations and prosecutions.

3.116 Few would argue that the ADF should not maintain its own disciplinary system, and the committee certainly does not. The military discipline system and the prosecuting of Service offences that undermine team morale and cohesion, such as desertion, is very important. Military personnel are best equipped to administer such a system. However, this view does not logically extend to the ADF operating an entire criminal system in duplication of the civilian environment. Practical considerations (including financial) and harsh reality (in particular, the underdeveloped criminal investigative skills and training of Service police compared with mainstream police), call into question the continued maintenance out of the public purse of a small and under-skilled criminal investigation service.

3.117 The question has to be asked: Why not keep the money and spend it on other ADF 'core business' requirements, relieve the commanders of having to decide which crimes they deal with and which they cannot and simply refer all suspected criminal activity to the civilian specialists?

3.118 The evidence before this committee reveals that a decade of rolling inquiries has not effected the kind of broad-based change required to improve the military police's investigative capacity. Despite constant scrutiny, the system is still plagued by delay and continually fails to equip personnel with the skills and experience necessary to conduct rigorous and fair investigations. Known problems have not been adequately addressed. The continual failure of the ADF to rectify recurrent problems leads the committee to the conclusion that the investigative function should be removed from the defence forces altogether and referred to the civilian experts.

### **Recommendation 1**

**3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.**

3.120 The committee also considers that the investigative function performed by the military police whilst the defence forces are on operations overseas is also inadequate. The SAS soldier's case is highly illustrative of shortcomings in this regard. Again, civilian policing expertise is available and could easily be drawn on to enhance investigative capability. The committee therefore recommends that the ADF make better use of the AFP's expertise, and outsource the investigation of crimes committed whilst on operations overseas.

**Recommendation 2**

**3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.**

3.122 Service police should only conduct investigations in the first instance where the offence in question has no equivalent in the civilian community. The committee acknowledges, however, that there may be instances where the civilian authorities chose not to pursue a matter. Where this occurs, the committee considers that current arrangements for referral back to the military police should be retained.

3.123 Investigations involving civilian equivalent or Jervis Bay Territory crimes should therefore only be conducted by the Service police where civilian authorities elect not to pursue a matter. To maintain the current limitations on the capacity of the Defence Forces to investigate and prosecute individuals in the military justice system, matters should then only be pursued where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

**Recommendation 3**

**3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.**

**Recommendation 4**

**3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.**

3.126 Referring matters to the civilian authorities in the first instance will improve military justice outcomes. The committee considers, however, that the training, expertise and competence of Service Police still needs to be addressed. Where matters are not pursued by civilian authorities and referred back to the military police, the capacity for military police to adequately investigate must be improved. A Service member's right to a rigorous and thorough investigation should not be dependent on a lottery of fluctuating civil police workloads and military police capabilities.

3.127 The committee notes that the Service police's capacity to perform its investigative function is in dire need of improvement. The committee endorses the recommendations contained in the Ernst & Young report for the improvement of the Service police's investigative function, and encourages engagement with civilian agencies, including secondments, reserve recruitment, and participation in civilian investigative training.

3.128 Regardless of whether criminal investigations are conducted by civilian or military police, the fact remains that they should be conducted competently. Several submissions have supported the proposition that the Defence force needs people working within the military justice system who have a sound knowledge and understanding of the institutional context in which the discipline system operates. Recruiting civilian police into the military through a reserve scheme, and exposing Service police to civilian police training through secondments will increase the skills base and expertise of the Military police investigation services. It would simultaneously allow for an appreciation of the institutional context within which the alleged crime has been committed.

3.129 The committee considers that reserve civilian police should assume a more important role in the investigation of discipline offences and offences that are referred back from civilian authorities. Reserves should be utilised to maintain and enhance the current skills base. Exposing permanent Service police to the expertise of civilian reservists will also improve the investigative function. The ADF should undertake an active reserve recruitment campaign to attract personnel from the federal and state police forces.

### **Recommendation 5**

**3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:**

- **fully implementing the recommendations contained in the Ernst & Young Report;**
- **encouraging military personnel secondments and exchanges with civilian police authorities;**
- **undertaking a reserve recruitment drive to attract civilian police into the Defence Forces;**
- **increasing participation in civilian investigative training courses; and**
- **designing clearer career paths and development goals for military police personnel**

3.131 Several submissions also suggested the creation of a tri-service serious crimes investigative capability. The committee also notes that the Canadian Forces have a 'National Investigation Service' that provides specialized and professional investigative services to the defence forces on a national and international basis. It has been suggested that the creation of a similar service for the ADF would allow the development of investigative expertise, streamline processes, utilise resources more efficiently, and would create a more appealing and identifiable career path for recruits.

3.132 The committee considers that this proposal warrants the attention of the ADF, and should be examined in detail. It would need to be preceded by a tri-service audit to determine current and future staffing, equipment, training and resourcing requirements. The committee further considers that the Ernst & Young Report, although confined to an examination of the Army's investigation capability, would



provide a good template upon which to base a subsequent examination of the ADF's investigative capability across the three services.

### **Recommendation 6**

**3.133 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.**

3.134 The committee acknowledges that recommending the removal of all civilian criminal equivalent and Jervis Bay Territory offences will have fundamental implications for the discipline system. It will now discuss the evidence concerning the provision of legal advice for decisions to initiate prosecutions and the defence of accused service members, and make flow-on recommendations.

